

TOM DAVIS, VIRGINIA,
CHAIRMAN

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
STEVEN C. LATOURETTE, OHIO
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE
NATHAN DEAL, GEORGIA
CANDICE MILLER, MICHIGAN
TIM MURPHY, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
JOHN R. CARTER, TEXAS
MARSHA BLACKBURN, TENNESSEE
PATRICK J. TIBERI, OHIO
KATHERINE HARRIS, FLORIDA

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3874
MINORITY (202) 225-5051
TTY (202) 225-6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LINDA T. SANCHEZ, CALIFORNIA
C.A. DUTCH RUPPERSBERGER,
MARYLAND
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE
BETTY MCCOLLUM, MINNESOTA

BERNARD SANDERS, VERMONT,
INDEPENDENT

November 10, 2004

MEMORANDUM FOR MEMBERS OF THE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

FROM: Doug Ose



SUBJECT: Briefing Memorandum for November 17, 2004 Hearing, "What is the Bush Administration's Record in Regulatory Reform?"

On Wednesday, November 17, 2004, at 10:00 a.m., in Room 2247 Rayburn House Office Building, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a hearing on the Administration's and the public's recommendations for regulatory reform, which are a part of the Office of Management and Budget's (OMB's) statutorily-required annual regulatory accounting statement and associated report, and the Bush Administration's response. The hearing is entitled, "What is the Bush Administration's Record in Regulatory Reform?"

Background

In 1996¹, Congress required OMB to submit its first regulatory accounting report by September 30, 1997. In 1997, Congress continued this requirement. In 1998, Congress changed the report's due date to coincide with the President's Budget. Finally, in 2000, Congress made this a permanent annual reporting requirement. Besides requiring a regulatory accounting statement and an associated report assessing the impacts of Federal rules, the 1996 and 1997 laws required OMB to "submit to the Congress a report that provides (4) recommendations from the Director and a description of significant public comments to reform or eliminate any Federal regulatory program or program element that is inefficient, ineffective, or is not a sound use of the Nation's resources." The 1998, 1999, and 2000 laws simply required OMB to include "recommendations for reform" with its annual regulatory accounting statement and analysis of the impacts of Federal regulation.

¹The requirements for OMB's regulatory accounting reports were enacted as: Sec. 645 of the Treasury, Postal Services and General Government Appropriations Act for 1997 (P.L. 104-208); Sec. 625 of the Treasury and General Government Appropriations Act for 1998 (P.L. 105-61); Sec. 638 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277); Sec. 628 of the Treasury and General Government Appropriations Act for 2000 (P.L. 106-58); and Sec. 624 of the Treasury and General Government Appropriations Act for 2001 (P.L. 106-554).

To date, OMB has issued six final regulatory accounting reports - in September 1997, January 1999 (dated 1998), June 2000, December 2001, December 2002, and September 2003. In addition, in February 2004, OMB issued its next report in draft for public comment. The Clinton Administration issued the first three; the Bush Administration issued the last four. The hearing will examine the Bush Administration's process for identifying its own candidates and evaluating the public's nominations, and its progress in responding to them for regulatory and paperwork reform results.

Clinton Administration

The prior Administration's September 1997 report stated, "we also sought comment on regulatory programs or program elements" (p. 65). However, the end result was that OMB included no reform recommendations in its report either identified by OMB or as a result of public nominations. The January 1999 report stated, "We also sought comment on regulatory programs or program elements ... We received 35 comments from members of the public and representatives of business groups, public policy institutions, public interest groups, and governmental entities" (p. 83). The report identified various agency regulatory initiatives in the November 1998 Unified Agenda of Federal Regulatory and Deregulatory Actions and then only included one specific recommendation for reform: electricity restructuring. The June 2000 report did not mention any OMB request for public comment, identified various agency regulatory initiatives in the November 1999 Unified Agenda, and did not include any other specific OMB or public recommendations for reform.

Bush Administration

During the Bush Administration, OMB issued three final and one not-yet-finalized draft regulatory accounting reports (in December 2001, December 2002, September 2003 and February 2004, respectively). OMB asked for public regulatory reform nominations in 2001, 2002 and 2004, i.e., not in 2003. In sum, the result was 71 nominations in 2001 and 316 nominations in 2002. OMB has not yet finalized its 2004 report; therefore, the number of nominations received in 2004 is unknown to us.

In its May 2001 draft 4th report, OMB asked for public comments on "specific regulations that could be rescinded or changed that would increase net benefits to the public by either reducing costs and/or increasing benefits" (66 FR 22054). OMB's December final 4th report stated, "We received 71 suggestions from 33 commentators involving 17 agencies that contained the requested information" (p. 61). OMB sorted the 71 into three categories: high priority ("we are inclined to accept and look into the suggestion"), medium priority ("we need more information"), and low priority ("we are not convinced at this point of the merits of the suggestion") (p. 62). The 23 high priority included: 8 Environmental Protection Agency (EPA), 5 Department of Labor (DOL), 2 Agriculture, 2 HHS, 2 Interior, 1 Education, 1 Energy, 1 Transportation, and 1 EEOC.

OMB's titles for the 8 EPA were: Mixture and Derived from Rule, Proposed Changes to the Total Maximum Daily Load Program, Drinking Water Regulations: Cost-Benefit Analysis, Economic Incentive Program Guidance, New Source Review (NSR), Concentrated Animal

Feeding Operations (CAFOs) Effluent Guidelines, Arsenic in Drinking Water, and Notice of Substantial Risk – TSCA. The 5 DOL were: OFCCP’s “60-2” Regulation – The Economic Opportunity Survey, Procedures for Certification of Employment Based Immigration and Guest Worker Applications, Proposal Governing “Helpers” on Davis-Bacon Act Projects, Overtime Compensation Regulation, and Recordkeeping and Notification Requirements (Wage and Hour Division).

In 2002, OMB changed the “ranked” system it used to categorize the 2001 nominations to an “agency-initiated” process. OMB justified this modification for two reasons: “(1) the large volume of nominations (316 in 2002 compared to 71 in 2001) strained OMB’s ability to develop an informed list of priority nominations for consideration by agencies and (2) giving agencies the task of evaluating the nominations allowed them to bring to bear their extensive knowledge and resources and encouraged them to develop a sense of ownership about reform” (p. 22, 9/22/03 report). OMB’s December 2002 final 5th report indicated the status of the 23 “high priority” nominations in 2001 and mentioned the result of its March 2002 draft report’s request for additional nominations not only of regulations and regulatory programs “in need of reform” but also nominations of agency guidance documents (67 FR 15033). The report stated, “OMB received comments on 267 regulations and 49 guidance documents from approximately 1,700 individuals, firms, trade associations, non-profit organizations, academics and government agencies” (p. 75).

OMB’s February 2003 draft 6th report did not ask for additional public nominations of regulatory reforms candidates. Instead, it sought public comment in the following three areas: “(1) Guidelines for regulatory analysis; (2) Analysis and management of emerging risks; and (3) Improving analysis of regulations to *[sic]* homeland security” (68 FR 5492).

OMB’s September 2003 final 6th report sorted the 316 (267+49) nominations in 2002 into 3 categories: “(1) issues already subject to recent or current review by Cabinet agencies (and EPA); (2) issues concerning independent agencies; and (3) issues that warranted consideration by Cabinet agencies (and EPA) as reform candidates” (p. 21). OMB included 92 rules and 12 guidance documents in category (1), 49 rules and 2 guidance documents in category (2), and 126 rules and 35 guidance documents in category (3). Then, the report provided further categorization for the 265 (92+12+126+35) rules and guidance documents in categories (1) and (3). Of these, OMB identified 45 as “new,” 109 as “completed or ongoing,” 30 as “undecided,” and 81 as “low priority or unnecessary” (Table 7, pp. 24-25). The four Executive Branch agencies with the most “new” were: 17 EPA (8 rules and 9 guidance documents), 11 Transportation (10 rules and 1 guidance document), 6 DOL (5 rules and 1 guidance document), and 6 HHS (all rules).

OMB’s titles for the 8 EPA rules were: Regulatory Reform for Handling Refrigerants, Chemical Plant Safety Standards, Protections for Farm Children from Pesticide Exposures, Definition of Volatile Organic Compound, TRI Alternate Reporting Threshold (Form A), Export Notification Requirements, Storage for Reuse, and TRI Form R Reporting. The 9 EPA guidance

documents were: EPA Index of Applicability Decisions; "Once In, Always In" Policy; TRI Reporting Forms and Instructions; TRI Reporting Questions and Answers; Waterborne Diseases; Integrated Risk Information System; Economic Benefit of Noncompliance in Civil Penalty Cases; Site-Specific Risk Assessments in RCRA; and, Submetering Water Systems. The 6 DOL rules and guidance documents were: Medical Certification (FMLA), FLSA Administrative Exception, Explosives and Process Safety Management (OSHA), Sling Standard (OSHA), Bloodborne Pathogens Standard (OSHA), and Multi-Employer Citation Policy (OSHA).

In OMB's February 2004 draft 7th report, OMB asked for public nominations of reforms relevant to the manufacturing sector and stated, "OMB is especially interested in suggestions to simplify IRS paperwork requirements" (p. 27). OMB's 2004 final 7th regulatory accounting report has not yet been issued.

Hearing

The hearing will also specifically explore public nominations affecting small business and several existing rules issued or to be issued by DOL and EPA, including but not limited to DOL's rules for the Family and Medical Leave Act (FMLA), and EPA's rules for its Toxic Release Inventory (TRI), New Source Review (NSR), and mercury.

The hearing is expected to conclude that OMB and the agencies need to devote more effort to reviewing existing problematic rules nominated by the public for regulatory reform.

The invited witnesses for the November 17, 2004 hearing are: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB; Stephen L. Johnson, Deputy Administrator, EPA; Howard M. Radzely, Solicitor, DOL; Thomas M. Sullivan, Chief Counsel for Advocacy, Small Business Administration; William Kovacs, Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce; Todd O. McCracken, President, National Small Business Association; Nancy McKeague, Senior Vice President, Michigan Health & Hospital Association, representing the Society for Human Resource Management; James L. Gattuso, Research Fellow in Regulatory Policy, The Heritage Foundation; Catherine O'Neill, Associate Professor, Seattle University School of Law, representing the Center for Progressive Regulation; and, John A. Paul, Supervisor, Regional Air Pollution Control Agency, Dayton, Ohio, representing the State and Territorial Air Pollution Program Administrators.